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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

JADAIR, INC.,

Petitioner,

v.

THE WALT KEELER COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Would it be a denial of Due Process for the federal court sitting in Wisconsin to exercise personal jurisdiction pursuant to Wisconsin's Long Arm statute over respondent The Walt Keeler Company, Inc. ("Keeler") where, inter alia (1) Keeler entered into a contract purchasing a piece of complicated machinery of substantial value from petitioner Jadair, Inc. ("Jadair"), a Wisconsin seller-manufacturer, and this action arises out of such contract, (2) Keeler was told by Jadair that the unit would be manufactured in Wisconsin, (3) Keeler prior to contracting knew that the unit necessarily had to be manufactured in Wisconsin, the location of Jadair's only manufacturing facility, and it was manufactured in and shipped from Wisconsin by Jadair F.O.B. Jadair's Wisconsin plant, (4) Keeler has had an ongoing relationship

with Jadair involving one overall continuing business transaction in which Jadair, pursuant to Keeler's orders, also subsequently shipped various component parts from Wisconsin to be used by Keeler in repair-maintenance of the complicated machinery, and (5) Keeler had numerous interstate mail and telephone contacts with Jadair as an integral part of Keeler's ongoing business dealings with Jadair?

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JADAIR, INC.,
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v.

THE WALT KEELER COMPANY, INC.,

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On Writ of Certiorari
to the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Jadair, Inc.*

("Jadair") respectfully prays that a

Writ of Certiorari issue to review the

judgment and opinion of the United

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*Pursuant to Supreme Court Rule 28.1, Jadair states that it has only one relationship falling within the ambit of this rule, to-wit: a subsidiary named Eco-Tec, Inc.

States Court of Appeals for the Seventh Circuit entered in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals is reported at 679 F.2d 131 and the opinion rendered by the District Court for the Eastern District of Wisconsin is reported at 508 F. Supp. 879. Both also appear in the Appendix.

JURISDICTION

The judgment below was entered on May 26, 1982. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

WIS. STAT. Section 801.05:

Personal Jurisdiction, Grounds for Generally. A court of this state having jurisdiction of the subject

matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

* * *

(5) Local Services, Goods or Contracts. In any action which:

(a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or

* * *

(d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction; ...

STATEMENT OF THE CASE

This is an action for a declaratory judgment that Jadair is not indebted to Keeler in any way via a vis the difficulties that Keeler has experienced with the Redi-Wash unit and auxiliary equipment it purchased from Jadair. It originally was brought by Jadair in the Circuit Court for Milwaukee County, State of Wisconsin. Keeler removed the action to the United States District Court for the Eastern District of Wisconsin, which court granted jurisdiction under 28 U.S.C. Section 1332 because of diversity of citizenship. The District Court denied Jadair's motion to remand because the amount in controversy did not exceed $10,000 and dismissed the

action for lack of personal jurisdiction over Keeler. The material jurisdictional facts are undisputed.

Jadair is a Wisconsin corporation that manufactures Redi-Wash machines and equipment at its plant in Port Washington, Wisconsin. Redi-Wash is the tradename for large complicated machines designed for cleaning out mechanical cement mixer trucks. Such machines are only specially manufactured pursuant to customers' orders. Keeler is a Kansas corporation involved in the business of producing, delivery and selling concrete and other building materials in Wichita, Kansas.

In February of 1977, Jadair's Vice President for Marketing and Sales, Kenneth Rust, met in Kansas with Keeler's President, Earl Callison, for the purpose of discussing Jadair equipment that Keeler might be interested in purchasing. Mr. Rust gave his standard sales presentation in which he described the history and

development of Jadair and its facilities and location in Port Washington, Wisconsin. Mr. Rust told Mr. Callison that Jadair's equipment is manufactured at its facilities in Port Washington.

Jadair's sales manager, William Sarring, also met in Kansas with Keeler's President, Earl Callison, on October 25, 1978, to discuss the possible sale of a Redi-Wash machine to Keeler. During this meeting, Mr. Sarring informed Mr. Callison that if Keeler purchased the unit it would be produced at and shipped from Jadair's facility in Port Washington, Wisconsin. This is, and always has been, Jadair's only facility for the manufacture of its products which are sold within the United States. Mr. Callison was informed that Port Washington, Wisconsin, was the only place where the Redi-Wash unit could be built.

On November 1, 1978 the parties entered into a contract for the sale and

purchase of a Redi-Wash machine. It provided for shipment F.O.B. Jadair's Port Washington, Wisconsin plant. The total purchase price was $75,850. The contract did not expressly require Jadair to manufacture the equipment in or ship it from Wisconsin. In addition to its initial purchase of the Redi-Wash Unit, Keeler subsequently has engaged in numerous (over a dozen) related sub-transactions involving component parts to be used in the repair-maintenance of the complicated Redi-Wash machine being shipped from Jadair to Keeler pursuant to Keeler's orders. Further, there were a host of interstate "contacts" (e.g., telephone calls, correspondence, invoices) between Jadair and Keeler reflecting their ongoing business relationship. However, Keeler's representatives never physically came to Wisconsin and Keeler's only "contacts" with Wisconsin were involved in this one overall ongoing business transaction.

REASONS FOR GRANTING THE WRIT

I. THIS CASE CONTAINS A UNIQUE AND UNDISPUTED FACTUAL VEHICLE THAT SHARPLY FOCUSES THE IMPORTANT, CONSTANTLY RECURRING, AND AS YET UNRESOLVED DUE PROCESS ISSUE GOVERNING THE OUTER LIMITS THAT STATE LEGISLATURES CAN GO TO IN ENACTING LONG ARM STATUTES EXTENDING JURISDICTIONAL POWER TO BOTH FEDERAL AND STATE COURTS IN CASES INVOLVING SINGLE CONSENSUAL INTERSTATE COMMERCIAL TRANSACTIONS.

Jurisdictional issues arising out of such common business relationships (e.g., single "transactions" involving contacts to manufacture and sell custom made goods) voluntarily and knowingly entered into interstate between corporate business enterprises, have been regularly reaching the courts for many years. Existing conflicts, confusion, inconsistency and uncertainty of result doubtlessly means that this litigation flow will continue unabated until this Court grants certiorari in a case such as this one.

The conflicting holdings and rationales gleaned by lower courts from existing Due Process jurisdictional precedent

of this Court are so severe and widespread that they exacerbate the customary predictive difficulties posed by the necessary amorphousness of the Due Process guarantee. The present situation is so unpalatable that responsible jurists and commentators have even gone to the extent of raising the question whether or not this Court should adopt a completely different set of more detailed standards, at least to govern this type of Due Process issue.* It must be said that viewing our federal and state courts as a single system of justice, neither judges, attorneys, nor parties can know short of protracted litigation what Due Process mandates in cases involving such common commercial transactions.

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*See, (e.g., Wisconsin Electrical Manufacturing Co. v. Pennant Products, Inc., 619 F.2d 676, 679 (7th Cir. 1980); Comment, Constitutional Limitations on State Long Arm Jurisdiction, 49 U. of Chi. L. Rev. 156 (1982).

Subsequent to International Shoe v. Washington, 326 U.S. 310 (1945), this Court has never decided whether or under what circumstances a single consensual interstate commercial transaction out of which a suit arises--other than an insurance contract (assuming McGee v. International Life Inurance Co., 355 U.S. 220 (1958), is to be so limited)--having substantial interstate "contacts" with the forum state, is sufficient to satisfy Due Process. The time is ripe for this Court to mark definitive guidelines in the application of International Shoe and its progeny in such common commercial contexts.

The recent vintage of many of the decisions discussed or cited herein evidence a widening, not a narrowing, of the chasms among the courts on this issue. On substantially indistinguishable facts, the holdings, as well as the underlying rationales, vary from circuit

to circuit, from state to state, between different district court judges and appellate panels within given circuits and between federal and state courts sitting in the same state. This results from the litigative verity that the Due Process jurisdictional decisions handed down by this Court subsequent to International Shoe do not yield reasonably clear guidance because they dealt with markedly different factual situations posing Due Process issues with markedly different "fairness" considerations.

This is a classic case illustrating the litigation flow that certain already greatly overburdened federal district courts are reaping pursuant to defendants' accurate perceptions that the Due Process jurisdictional mandate is stricter in some Circuit's federal courts than in the state courts located therein. This also

is an important issue meriting resolution by this Court because there is a very substantial line of cases typified by the decision below, in which Federal Courts are not only barring the exercise of jurisdiction, but in doing so are overriding the expressed will of various state legislatures by essentially holding that their respective Long Arm statutes are unconstitutional.

Because of certain unique undisputed factual elements, this case presents a well nigh perfect vehicle for this Court to resolve this omni-present and important Due Process issue. The contract here had no term expressly "requiring" manufacture in Wisconsin. However, as the District Court held, the nature of the contractual obligations Keeler intentionally entered into rendered performance in Wisconsin "inevitable" although not "necessary." Further, Keeler was expressly told where the goods

were to be manufactured. Not only did Jadair nowise have complete control in a practical sense over where to perform, but Keeler was fully aware (i.e., had knowledge) that performance in Wisconsin was not only intended, but was in a practical sense necessary. Moreover, Jadair did perform the contract (i.e., specially design and manufacture the unit, and ship it) in Wisconsin. There was not merely one isolated "single act" involving Jadair and Keeler, but rather an on-going interstate business relationship, involving numerous interstate "contacts" and sub-transactions occurring in the context of one overall commercial transaction. Finally, Wisconsin has a very specific and far reaching Long Arm statute that unequivocally poses the issue whether it violates the Due Process guarantee.

II. THE DECISION BELOW IS IN CONFLICT WITH A HOST OF FEDERAL AND STATE DECISIONS, INCLUDING THOSE OF THE WISCONSIN SUPREME COURT AND ALSO OTHER SEVENTH CIRCUIT DECISIONS.

The deep, fundamental, and widespread divisions among various federal and state courts vis a vis this type of issue is only too well documented, and the cases involved therein are ever increasing. See, e.g., Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc., 597 F.2d 596, 601-03 (7th Cir. 1979) (held no jurisdiction), cert. denied, 445 U.S. 907 (1980) (opinion of Justices White and Powell dissenting). This disarray furnishes a fertile ground for law review commentators, but may well have a disruptive effect on commercial relations. Further, it indisputably prompts a very substantial quantum of litigation on this issue, much of which is being channeled into overburdened federal courts as a result of defendants such as Keeler removing cases from state courts to

federal courts in order to obtain a more favorable forum for resolution of this Due Process issue.

The above verities are underlined by the following conflicting decisions dealing with this basic Due Process issue as to which there were recent denials of certiorari, to-wit: Mouzavires v. Baxter, 434 A.2d 988 (D.C. Cir. 1981) (jurisdiction upheld), cert. denied, ___ U.S. ___, 102 S. Ct. 1643 (1982) (Justices White and Powell dissenting); Iowa Electric Light & Power Co. v. Atlas Corp., 603 F.2d 301, (8th Cir. 1979) (jurisdiction denied), cert. denied, 445 U.S. 911 (1980) (Justices White, Powell and Blackmun dissenting); Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560 (Tenn. 1981) (jurisdiction upheld), cert. denied, ___ U.S.___, 102 S.Ct. 1623 (1982) (The Chief Justice, along with Justices White and Powell dissenting).

This lack of clear guidance by this Court on this basic Due Process issue results not only in a steady flow of petitions such as this one, but also patently conflicting holdings and/or rationales among various circuits, and ostensible conflicts between cases decided by different panels within the same circuit. The situation poses well nigh insurmountable difficulties for federal district court judges* resolving such issues in the first instance. From litigants' attorneys' point of view, there is no way to predict with any reasonable certainty how given close Due Process issues will be ultimately decided and hence there always is a ready incentive for both sides to litigate the issue at the appellate level.

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*Witness the perceptive comments of the District Court below punctuated by terms such as "enigmatic", "retrenchment", "cast doubt", and "further muddled".

A. General Circuit Court Conflicts

Recent developments in this country outside the Seventh Circuit demonstrate not only the existence of the aforementioned conflict of holdings and rationales, but also the litigative reality that the existent Due Process jurisdictional decisions of this Court do not yield sufficiently precise guidelines vis a vis the proper manner in which such issues should be resolved. The nature and extent of these ever widening chasms among the courts is typified by comparing the very recent holdings and rationales in (1) Nicholstone and Mouzavires to (2) this case and Iowa Electric. Further, it also is instructive to compare the decision below to the following very recent decisions whose holdings and/or rationales are in irreconcilable conflict therewith: CleveRock Energy Corp. v. Trepel, 609 F.2d 1358, 1364-65 (10th Cir. 1979) (payments sent to forum state and

"reasonably could have anticipated" plaintiff's duties under the contract "would be largely performed" at plaintiff's headquarters in the forum state); Good Hope Industries v. Ryder Scott Co., 378 Mass. 1, 389 N.E.2d 76, 78-83 (Mass. 1979) (plaintiff's headquarters were known to be in forum state; defendant engaged in interstate correspondence and telephone calls over a period of 17 months; "defendant's actual physical presence here (in forum state) is not required ..."; defendant's business "contacts" were "deliberate and not fortuitous;" the forum state has a "legitimate interest in providing a forum" for its corporate citizens to litigate this controversy); Murray v. Huggers Manufacturing, 398 So.2d 1323 (Miss. 1981) (defendant-seller knew plaintiff-buyer located in forum state and plaintiff performed there); Koenig v. International Brotherhood of Boilermakers,

Local Lodge No. 5, 284 Pa. Super. 558, 426 A.2d 635, 639-644 (1980) (1 dissent; majority reasoned that "[a] nonresident defendant that enters into a contract that he knows will be substantially performed in the forum state [by plaintiff] should "reasonably anticipate being haled into court in that state" if disagreements develop).

The decision below also is in irreconcilable conflict with a host of earlier cases in other circuits holding that a defendant buyer's knowledge that goods which it ordered would be manufactured in the forum state renders it fair in a Due Process sense to assert personal jurisdiction over that defendant even in a "single act" (i.e., solely one contract) case -- regardless whether he was physically present in the forum state. Consider, for example, In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220,

226-29 (6th Cir. 1972) where the Sixth Circuit reasoned, inter alia:

> "In some cases, meeting this requirement [that the defendant purposefully acted within the forum] may pose the most difficult challenge of all for a plaintiff seeking to establish jurisdiction over a non-resident defendant. Here, however, it seems clear that the defendant acted in such a manner. Van Dusen entered into contract negotiations involving a substantial order for the manufacture of goods with a firm which it necessarily knew was based in Ohio and had its production facilities located within that State." 466 F.2d at 266-67. (emphasis added)

The Sixth Circuit, along with numerous other courts, assesses whether a breach of contract cause of action arises out of the defendant's transaction of business in the forum by looking to the indirect effects within the forum state of defendant's acts physically accomplished outside the forum state. Id. at 229. The Seventh Circuit, as well as

a substantial number of other courts, focuses not on such effects, but rather on the geographical location of the events giving rise to the in-state effects. Accordingly the Sixth Circuit line of cases does not require physical presence of the defendant's represntatives in the forum state, while the Seventh Circuit line of cases does. Further, the Seventh Circuit's current basic approach is irreconcilable with the Sixth Circuit conclusion that Due Process fairness does not preclude the assertion of jurisdiction over corporate defendants in disputes arising out of such commercial transactions:

> "It cannot be disputed that a state has an interest in resolving a suit brought by one of its residents. [Citations omitted]. That interest necessarily becomes more significant when, as here, a contract calling for substantial production of goods is entered into, with the production of goods and other performance under the contract to take place entirely within the forum

> state. [Citing, inter alia, the Seventh Circuit's decision in O'Hare International Bank v. Hampton, 437 F.2d 1173, 1177 (7th Cir. 1971)]. Holding a defendant answerable for his failure to perform the obligations imposed upon him by such a contract is consistent with Ohio's express policy of securing to its businessmen the benefit of their bargains." Id. at 232.

Many, if not most state legislatures (including Wisconsin's) in enacting their respective Long Arm statutes have so seen their states' interests and have extended their state courts' jurisdiction over such defendart-buyers.

The Seventh Circuit also is in irreconcilable conflict with the Eighth Circuit's decision in Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 369 (8th Cir. 1969), where it was reasoned, inter alia:

> "It entered into a transaction having an impact on the commerce of that state. By so doing, it invoked the benefit and protection of Minnesota's laws and could reasonably

> have anticipated that its act would have consequences in Minnesota. The fact that no agent of the defendant entered this state is not controlling." [Citation omitted].

In Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933, 937 (10th Cir. 1967), a case with a very similar fact situation, it was held:

> "Initial (i.e. solicitation) contact is not decisive. The subsequent conduct of P & C shows that it purposely availed itself of the privilege of carrying on activities to secure goods from a Kansas manufacturer and seller."

For other cases conflicting with the decision below, see also, e.g., Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818, 822 (4th Cir. 1972), cert. denied, 411 U.S. 966 (1973); Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 382 (6th Cir. 1968); Shealy v. Challenger

Manufacturing Co., 304 F.2d 102 (4th Cir. 1962).

The decision below also is in irreconcilable conflict with numerous decisions in other jurisdictions which give substantial weight to buyers' interstate mail and telephone "contacts" with seller-manufacturers located in the forum state. While such contacts are not in themselves sufficient, they are important factors and here they should have constituted the requisite "plus" necessary to satisfy Due Process. Numerous such "contacts" manifested Keeler's active involvement in various business subtransactions that were essential parts of its on-going and necessary business relationship with Jadair.*

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*Keeler bought a complicated piece of machinery that required ongoing interstate repair-maintenance support from Jadair in Wisconsin even after the machinery was installed in Kansas. The sales contract was however a "one shot" business

(footnote continued)

Telephone and mail communications, allowing Keeler to avoid the expense and time of traveling to Wisconsin, were the means by which it reaped the benefits of Jadair's activities in Wisconsin accomplished at its behest. See, e.g., In-Flight Devices Corporation v. Van Dusen Air, Inc., supra, at 235:

> "A letter or telephone call may, in a given situation, be an indication of substantial involvement by the defendant or its agents."

"The test of whether business was transacted within the state must be applied in the context, not of communication and transportation criteria of yesteryears, but of modern day commercial

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(footnote continued)

transaction that terminated when the machinery was shipped. Absent continual support from Jadair, it could not be effectively operated by Keeler in Kansas as Jadair had unique and necessary repair-maintenance expertise. Hence there were numerous post-shipment interstate "contacts" of Keeler with Jadair in Wisconsin.

and personal accelerated relationships." O'Hare International Bank v. Hampton, 437 F.2d 1173, 1177 (7th Cir. 1971).

B. Conflicts Between Federal and State Courts Sitting in the Forum State

As was candidly recognized in Lakeside, supra, the Seventh Circuit's Lakeside-Jadair doctrine also is in irreconcilable conflict with the Wisconsin Supreme Court's prevailing holdings and rationales. See, e.g., Zerbel v. Federman & Co., 48 Wis.2d 54, 179 N.W.2d 872, 873-74, 877-78 (1970), appeal dismissed, 402 U.S. 902 (1971); Flambeau Plastics Corp. v. King Bee Manufacturing Co., 24 Wis.2d 459, 129 N.W.2d 237, 241 (1964).

C. Conflicts Within the Seventh Circuit and Emergence of the Erroneous Physical Presence and/or Multiple Transactions Requirement

Conflicts and murkiness within given circuits, resulting from the lack of clear guidance from this Court's Due Process jurisdictional decisions, as well as the

recent emergence of what is at least arguably a per se physical presence and/or multiple "transactions" requirement as to this type of Due Process issue, is typified by the situation within the Seventh Circuit. The decision below, as well as Lakeside, is, at least arguably, in conflict with other decisions rendered by different panels.

O'Hare International Bank v. Hampton, supra, (7th Cir. 1971), involved a suit by the assignee of an interstate lease of an aircraft against its guarantors. Holding that Due Process did not bar the exercise of jurisdiction, that panel emphasized:

> "The defendants certainly must have contemplated the effects in Illinois of a failure to make the monthly rental payment. Furthermore, the fact that the guarantee was to be construed according to Illinois law and performed in that state clearly demonstrates that the defendants 'invoked the benefits and protection' of the state." Id. at

1177 (citations omitted) (emphasis added).

The Seventh Circuit viewed the jurisdictonal facts in United States Ry. Equip. Co. v. Port Huron & Detroit R. Co., 495 F.2d 1127 (7th Cir. 1974), which involved an interstate lease agreement covering four hundred railroad box cars, as being virtually identical to those in O'Hare, emphasizing:

> "The only significant fact present in O'Hare which is missing here is that in O'Hare the defendant initiated the lease negotiations by contacting plaintiff's assignor in Illinois. In the context of the present transaction between corporations, involving substantial sums of money, we cannot regard such differences as controlling. The present lease contemplated and in fact produced substantial on-going activity within Illinois, a factor apparently not present in O'Hare." Id. at 1130 (emphasis added).

The rationales and holdings of the Seventh Circuit in these two cases are,

at least ostensibly, difficult to reconcile with the decision below in this case or Lakeside. Further, the rationale and holding in this case went well beyond Lakeside. Keeler knew in advance of contracting that it was inevitable that Jadair would perform in the forum state. Further, there was not a "single act," but rather an ongoing business relationship involving numerous interstate orders, shipments, payments, telephone calls, etc. in a repair-maintenance context. The Seventh Circuit in so extending the Lakeside decision exacerbated existing uncertainties in this Circuit vis a vis resolution of this type of Due Process issue. The decision below, at least arguably, conflicted with other post-Lakeside decisions. The degree of uncertainty and ostensible conflict is indicated by the extent to which appelate decisions resulted in reversals of the district courts.

In Lakeside the Seventh Circuit reversed the district court and dismissed the case for want of personal jurisdiction. Two subsequent decisions by different panels of the Seventh Circuit, although also involving reversals of the district court, went the other way as it was held there was personal jurisidiction, to-wit: Wisconsin Electrical Mfg. Co. v. Pennant Products, 619 F.2d 676 (7th Cir. 1980), and Biltmoor Moving & Storage Co. v. Shell Oil Co., 606 F.2d 202 (7th Cir. 1979) (rehearing en banc denied). These cases, read in conjunction with Lakeside, reveal that while there arguably may indeed be a razor sharp line between offending and not offending Due Process in exercising jurisdiction over such commercial transactions, it is at best very difficult for district court judges and practicing lawyers to discern or predict that line in a given case.

The Due Process "rule of thumb" disclosed by this series of cases appears to be that it is only necessary to have the Lakeside contacts "plus" in order to be able to constitutionally exercise jurisdiction. Under the flexible International Shoe doctrine, the nature of the "plus" can and will vary from case to case. But there is insufficient guidance from this Court as to what will or will not suffice, to enable one to be able to predict litigation outcomes with any degree of reasonable certainty. Further, it is at least arguable that Lakeside and Jadair boil down to a per se physical presence requirement in all single interstate "transaction" (not single "act") commercial cases and/or a per se requirement of multiple "transactions."

The factual setting in Wisconsin Electrical Manufacturing Co., supra, was nearly identical to the factual setting

in Lakeside (e.g., "single act" case) except that the out-of-state defendant's agents had been physically present in Wisconsin twice. The Seventh Circuit held that these additional contacts were sufficient (not necessary) to take the case outside of the Lakeside holding. Ironically, the very same district court judge who was reversed in Lakeside for holding there was jurisdiction, now was reversed for holding that there was not jurisdiction. 619 F.2d at 679. Further, since the court was treading very close to a de facto repeal of the International Shoe doctrine that a defendant need not be physically present in the forum State and a return to the Pennoyer v. Neff "presence" notions, the Seventh Circuit cautioned:

> "For the exercise of personal jurisdiction, the defendant need not have been physically present in the state, but need only have acted indirectly within the forum state. See Fisons,

Ltd. v. United States, 458 F.2d 1241, 1250-1252 (7th Cir.), cert. denied, 405 U.S. 1041, 92 S.Ct. 1312, 31 L.Ed.2d 581 (1972)." 619 F.2d at 678, n. 6.

The decision below is in conflict with the above rationale and constitutes a return to Pennoyer v. Neff via what amounts to a per se rule requiring such physical presence in the forum state in single "transaction" cases. Here Keeler in effect acted "indirectly" within Wisconsin by entering into a contract with Jadair--knowing it was "inevitable" that Jadair would perform it in Wisconsin--which caused Jadair to do certain manufacturing-shipping acts in performance thereof within Wisconsin. Further, the numerous subsequent interstate "contacts" of Keeler with Wisconsin resulting from its on-going commercial relationship with with Jadair involving over a dozen repair-maintenance sub-transactions, renders

Keeler's relationship with Wisconsin sufficient (i.e., constitutes the "plus") for Due Process purposes under International Shoe and its progeny.

The decision below also appears to be in conflict with the Seventh Circuit's decision in Biltmoor, supra. That was an action for breach of contract by a company hired to move a business to Texas. There too only one contract was involved (i.e., there not an ongoing business relationship). Nonetheless it was held Due Process was not violated. Adverting to the fact that the business was to be moved from its location in Illinois, that panel stated that the contract "absolutely required" performance* within Illinois, the forum state, and it was held that this

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*The District Court below ruled factually that since Jadair was only located in Wisconsin, it was "inevitable", although not "necessary" that Jadair's performance of its contract with Keeler would take place in Wisconsin.

fact was sufficient to take the case outside of Lakeside. The Seventh Circuit added:

> "Illinois courts have not always distinguished between situations where the contract requires performance in Illinois and situations where, although the contract is silent, the defendant knows in advance that performance will take place in Illinois. The distinction is immaterial in this case because this contract absolutely required performance in Illinois, satisfying the standards of both the Illinois cases and the language of this court in Lakeside Bridge, 597 F.2d at 603.13." 606 F.2d at 207 (emphasis added).

The District Court below found factually that Keeler knew in advance that performance by Jadair would take place in Wisconsin. Further, under the particular factual circumstances here, the distinction adverted to in Biltmoor is immaterial because the nature of the contract rendered performance by Jadair

in Wisconsin "inevitable" and "necessary." The nature of Jadair's contractual obligations meant that there was absolutely only one place where performance could occur, to wit: Port Washington, Wisconsin. The Redi-Wash machine which Keeler purchased from Jadair is Jadair's proprietary design and it is simply not made anywhere else in this country. Further, even if this distinction is deemed to be material in this case, under Due Process it should be sufficient that defendant-buyers know in advance that a sales-manufacturing contract will be performed in the forum state. The ultimate goal under Due Process fairness should be a lack of "surprise" resulting from unexpected fortutious contacts with a state, not technical contractual niceties (e.g., whether contract's boiler-plate expressly states seller must manufacture goods in a given state).

Further, the decision below is in conflict with the rationale embraced in yet another recent Seventh Circuit case. The District Court below perceived the decision in Koster v. Automark Industries, 640 F.2d 77 (7th Cir. 1981), as having "further muddled"* the situation in this Circuit concerning this basic Due Process issue. However, the facts of Koster are in no way similar to the facts of the

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*The District Court below erroneously relied on Koster as support for the proposition that in the present case it is not even a "significant factor" that the defendant knew the contract would be performed in Wisconsin. The District Court adverting to the "single act" decisions in Lakeside and Koster essentially reasoned that Keeler's representatives did not come into the state and the sales contract did not expressly require performance in Wisconsin. The District Court also cited Whittaker Corporation v. United Aircraft Corporation, 482 F.2d 1079 (1st Cir. 1973) in support of its rationale of furthering a policy of encouraging business transactions between residents of different states by barring seller-manufacturers from suing buyers in the former's home state--despite the Wisconsin legislature's unequivocal political-policy decision to the contrary in enacting Wisconsin's Long Arm statute.

present case. There, the contract had been executed in Italy and involved the purchase of goods manufactured in Switzerland. Defendant's only contacts with the Netherlands were eight letters and possibly a telegram or transatlantic telephone call. The Seventh Circuit, following an International Shoe analysis (e.g., purposeful minimum contacts with the forum), distinguished two Illinois cases whose holdings and relationales are in point here and squarely mandate that Due Process is not offended because (1) "performance of the manufacturing contract" was expected to occur wholly within "the forum state" and (2) the "performance of the contract" was carried out in Wisconsin and Keeler's interstate "contacts" with Jadair were "all that was necessary" for Keeler to be able "to achieve its [business] purposes" of having Jadair manufacture, sell and ship certain goods to it from Wisconsin.

III. THE DECISION BELOW IS IN IRRECONCILABLE CONFLICT WITH THE RATIONALES EMBRACED BY THIS COURT IN INTERNATIONAL SHOE AND ITS PROGENY.

The decision below in effect (1) returns to Pennoyer v. Neff, 95 U.S. 714 (1877), notions of physical presence and technical contractual niceties which have long since been rejected by this Court with respect to all single interstate commercial "transactions" (not just in single "act" cases) and (2) conflicts with International Shoe and its progeny. If Due Process cannot be satisfied in a single interstate business "transacton" under these particular factual circumstances, it never can be.

The Court of Appeals below viewed as decisive the factors that there was only one overall interstate "transaction" (even though there were numerous interstate contracts and "contacts" involved therein) and that Keeler representatives had never physically come to Wisconsin in

connection with its ongoing business dealings with Jadair. The single "transaction" thesis is in conflict with this Court's substantial and not isolated "contacts" principle. Further, while physical presence is many times a sufficient nexus with the forum state, it is hardly necessary--either as a per se rule or under the particular factual circumstances present here. Such a physical presence requirement constitutes a drastic retreat from International Shoe and McGee which ruled that interstate "contacts" can be sufficient --even in a "single act" context. It signals a return to the regime of Pennoyer v. Neff, in which the federal judiciary, espousing rigid mechanical legal concepts of physical power and physical presence, straight-jacketed the states' attempts exercise their sovereignty by extending their Courts' jurisdiction over corporate non-residents.

Long ago the Pennoyer v. Neff rationale caused unjustifiable strain with respect to the demands of justice vis a vis an increasingly mobile, interstate, commercial-business structure in this country. Finally, about three decades ago in International Shoe Co. v. Washington, supra, this Court rejected the legal fictions at the heart of Pennoyer v. Neff and enunciated the standard that subsequently has remained the touchstone for determining when it would not offend Due Process to subject a nonresident defendant to suit in the forum state--even when there is only a "single act" involved:

> "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". 326 U.S. at 316 (emphasis added).

The decision below, which built upon and went well beyond Lakeside is in irreconcilable conflict with not only the International Shoe and McGee holdings and rationales, but also with the rationales underlying several recent decisions of this Court.

Consider, for example, Note, Lakeside Bridge & Steel Co. v. Mountain State Construction Co.: Inflexible Application of Long-Arm Jurisdiction Standards to the Nonresident Purchaser, 76 Nw.U.L.Rev. 345 (1980), which pointed out, inter alia:

> "The court in Lakeside appeared to treat the 'minimum contacts' concept as a physical contact requirement rather than a symbol of relationship with the forum state sufficient to sustain jurisdiction in harmony with due process demands and overall fairness (p. 347)
>
> ....
>
> "The court in Lakeside derived a distorted standard as a result of its selective reading of relevant case law. Had

the Seventh Circuit conducted a more complete survey of precedents and persuasive authority, it might have brought a balanced standard to its application of the law to the facts of Lakeside. Such a standard would require a flexible examination of all relevant factors in each case: the business or personal nature of the transaction; the nature and magnitude of the transaction; the foreseeability of litigation in the forum state; the overall fairness of litigating in the forum state given the defendant's relationship to the state and impact on the state; and the interests of the plaintiff and the forum state. (p. 356)

....

"... A flexible analysis would reveal that the defendant Mountain State did purposefully avail itself of the opportunities and, consequently, the responsibilities of transacting business with the resident manufacturer. (p. 361)

....

"... The court adopted a distorted standard, applied it too rigidly, and overlooked other

> relevant factors.... A flexible analysis would necessitate looking beyond who initiated the contacts, who stepped over a state boundary line, and where goods ordered were specified to be manufactured. A court must examine the contract negotiations, consider the custom order nature of the transaction, recognize the commercial benefit to the parties of such a sizable contract, and accord sufficient weight to the interests of the forum state. These factors, as well as the reasonable expectation of the defendant and the absence of any demonstrated unfairness, compel a result contrary to the Seventh Circuit's holding". (p. 361).

This critique is even more appropos vis a vis the decision below than Lakeside.

The decision below is incompatible with the rationale embraced in Shaffer v. Heitner, 443 U.S. 186, 203-04, n. 20 (1977) where this Court reaffirmed the aforesaid International Shoe interstate "contacts" doctrine, explained its

juxtaposition to Hanson v. Denckla, 357 U.S. 235 (1958), and then cautioned:

> "Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:
>
> > 'Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.'"

The decision below which gave decisive weight to the lack of physical presence of Keeler's representatives in the forum state and the lack of multiple "transactions" is incompatible with the above standard. There is no necessary rational link between (1) physical presence in the forum state and the number of "transactions" and (2) basic Due Process reasonableness-fairness--at least in a commercial context. What should be decisive

is the nature and extent of the interstate "contacts," as well as whether or not buyers realize they are dealing with with manufacturers-sellers who are located and will be performing in the forum state.* Interestingly, in Shaffer, there was physical presence (i.e., of property) within the forum state, but this was held not to be sufficient

> "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal

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*Consider in this regard the recent stimulating Due Process analyses and suggestions in Comment, Constitutional Limitations on the State Long Arm Jurisdiction, supra, particularly the section dealing with commercial transactions which also is critical of the Lakeside doctrine (49 U. of Chi. L. Rev. at 173-79). The plethora of recent law review articles exploring this Due Process issue is mute testimony that this issue is ripe for resolution by this Court.

jurisdiction." 433 U.S. at 204.

The decision below also is in conflict with the rationale of Hanson v. Denckla, supra, where it was held that a defendant must "purposely avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." This principle was satisfied by Keeler purposely entering into a sales contract with Jadair for the special manufacture of a large piece of complicated equipment, which it knew inevitably had to be performed in the forum state, and which was in point of fact performed there. As the Seventh Circuit itself recently recognized in Wisconsin Electrical Manufacturing Co., Inc. v. Pennant Products, Inc., supra, it is sufficient if defendant-buyers "indirectly" so act within the forum state. Nonetheless, in the decision below the Seventh Circuit did not follow

this basic Due Process principle. Rather, it erroneously, in effect, returned to a wooden per se rule requiring direct physical presence in the forum state and/or multiple "transactions."

The authors of Comment, Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson, 80 Colum. L. Rev. 1341 (1980), recently had the following to say about the Supreme Court's purposeful affiliation standard enunciated in Hanson v. Denckla:

> "The Court has not agreed on the exact meaning and function of the purposeful affiliation requirement. See, e.g., Rosenblatt v. American Cyanamid Co., 86 S.Ct. 1, 4 (Goldberg, J. denying day) appeal dismissed, 382 U.S. 110 (1964) (per curiam). On occasion, however, the Court has implied that the requirement insures that the exercise of jurisdiction is fair to the defendant in somewhat distinct respects.
>
> "First, there is the notion of 'reciprocity': that it is fundamentally unreasonable to subject a

> defendant to the burden of suit in a state from which he has neither derived nor attempted to obtain any benefit whatsoever. See Kulko v. Superior Court, 436 U.S. 84, 101 (1978). Second, there is the notion of 'fair notice': that a defendant should be subject to suit only in a state in which he reasonably could expect to be haled into court. See Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Id. at 217-219 (Stevens, J., concurring)...." 80 Colum. L. Rev. at 1352, N. 89. (Emphasis added).

Both aspects are easily satisfied here. However, the decision below not only failed to give any consideration to these two basic Due Process principles, but is in irreconcilable conflict therewith.

The decision below conflicts with the first purpose of Hanson v. Denckla, by failing to give due weight to the substantial economic benefit that Keeler sought to and did derive from its numerous ongoing business "contacts" with Jadair in Wisconsin. Keeler is a large commercial

concern that purchased an expensive ($78,000) and very useful, but complicated, piece of equipment for use in its business. Keeler not only contemplated, but received a substantial economic benefit from its ongoing business relationship (e.g., re maintenance-repair) with Jadair.

Likewise, the decision below conflicts with the second purpose of the Hanson v. Denckla principle. It was in a Due Process sense foreseeable to Keeler that its ongoing and substantial business relationship with Jadair might subject it to jurisdiction in a Wisconsin court. When a business corporation enters into a subcontractual contract with a manufacturer whose operations are all located in a particular state, which results in an ongoing business relationship involving many sub-transactions and a host of interstate "contacts" with the forum State, that business corporation is in no position to claim "surprise" in a Due Process

sense when an action relating to the contract is instituted in that state after disagreements have erupted. Nor did Keeler even attempt to prove any such "surprise" in this case.

Accordingly, the decision below also is in conflict with the rationale of Kulko v. California Superior Court, 436 U.S. 84, 92, 96-97 (1980) which is another "single act" case where the International Shoe doctrine was reaffirmed. It was emphasized that "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered"* and

> "In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the

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*It is not without significance that the line of cases which the decision below is a part of, essentially involve federal courts overriding the will of the people of this country as expressed via their popularly elected legislatures' enactment of "Long Arm" statutes.

> State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an 'effect' in California was misplaced. See supra, at 89, 56 L Ed 2d, at 139. This 'effects' test is derived from the American Law Institute's Restatement (Second) of Conflict of Laws §37 (1971),
>
> "While this provision is not binding on this Court, it does not in any event support the decision below. As is apparent from the examples accompanying §37 in the Restatement, this section was intended to reach ... or commercial activity affecting state residents, ibid....
>
> "... The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations."

Here, Keeler's ongoing interstate commercial "transaction" led to this controversy; its choice to enter into the manufacturing contract caused "effects" in performance of that contract within

Wisconsin by Jadair; and it purposefully derived commercial-business benefits from its "activities relating to the State of Wisconsin." Hence the decision below is in irreconcilable conflict with the above quoted basic Due Process principles enunciated by this Court.

The decision below for the same reasons is in conflict with the rationale underlying Rush v. Savchuk, 444 U.S. 320, 327 (1980):

> "In short, it cannot be said that the defendant engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, ...merely because his insurer does business there.
>
> "Nor are there significant contacts between the litigation and the forum." (Emphasis added)

There is no room under the Rush principle for mechanical per se requirements that buyers such as Keeler must either, while physically in the forum state via its

representatives, have entered into a commercially nonsensical sales contract that expressly specifies that the goods must be manufactured in the forum state, or have entered into more than one "transaction." As to the first, this Court looked for "contacts with," "the relationship among," "purposeful activity related to" and "significant contacts between"--not for acts directly accomplished by the defendant within the state in the physical sense. As to the second, the focus was solely upon "traditional notions" of fair play and "substantial justice" geared to an analysis whether the defendant purposefully entered into a relationship with a state knowing that it was located in the forum state--not an examination of contracting technicalities and a mechanical counting of the number of "transactions."

In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980),

this Court also followed the International Shoe analysis vis a vis the "contacts" between defendants and the forum state in the context of considerations such as "fairness," "reasonableness," and the "forum state's interest in adjudicating the dispute," emphasizing:

> "The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in McGee v. International Life Ins. Co., 222-223, ... this trend is largely attributable to a fundamental transformation in the American economy:
>
> > 'Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation

> and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'
>
> "The historical developments noted in McGee, of course, have only accelerated in the generation since that case was decided." 444 U.S. at 292 (emphasis added).

The decision below ran directly counter to this "relaxing" trend and its rationale is completely out of step with the above principles that led thereto.

CONCLUSION

This case unequivocally poses this basic unresolved Due Process issue in a unique and undisputed factual setting which sharply focuses the material Due Process considerations. The issue is ripe for resolution by this Court, as lower courts and law review commentators have explored in depth the various considerations involved. There is a pressing

need for this Court to determine, inter alia, the proper role, if any, in the controlling Due Process methodology, of a requirement of "physical presence" and a requirement that there must be multiple "transactions." This Court should consider whether or not it is a sufficient inter-state connection with the forum state that a foreign business corporation purposely entered into a single substantial sales-manufacturing contract which it knew was going to be performed by the seller manufacturing the goods in, and shipping the goods F.O.B. from, the forum state. Due Process jurisdictional decisions rendered by this Court to date yield only amorphous, and arguably conflicting, guidance vis a vis this basic issue which has resulted in

continual litigation with widely conflicting results.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1380

JADAIR, INC.,

Plaintiff-Appellant,

v.

THE WALT KEELER COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79-C-791—Robert W. Warren, *Judge.*

SUBMITTED JANUARY 11, 1982*—DECIDED MAY 26, 1982

Before CUMMINGS, *Chief Judge*, SPRECHER** and WOOD, *Circuit Judges.*

CUMMINGS, *Chief Judge.* Jadair, Inc. ("Jadair"), a Wisconsin corporation, brought a declaratory judgment action in Wisconsin state court against the Walt Keeler Company, Inc. ("Keeler"), a Kansas corporation. Keeler removed the suit to federal court under 28 U.S.C.

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* This case was scheduled for oral argument on January 11, 1982. Owing to severe winter weather, the parties agreed to submit it on the briefs.

** Circuit Judge Robert A. Sprecher read the briefs, participated in the conference and voted to affirm. However, he died without reviewing this opinion.

§ 1441(a). Jadair challenged the removal, arguing that Keeler had failed to demonstrate an amount in controversy in excess of $10,000. In a March 1980 memorandum and order Judge Warren denied Jadair's motion to remand the case to state court. Then Keeler moved to dismiss the federal suit for lack of personal jurisdiction, and in a February 1981 memorandum and order Judge Warren granted Keeler's motion. Jadair's appeal is phrased in the alternative: the case should have been remanded; if not, the federal court should have exercised jurisdiction over Keeler. We affirm both of Judge Warren's rulings.

I

Jadair manufactures machinery for cleaning cement mixers in Port Washington, Wisconsin. In November of 1978 Keeler, which produces concrete and other building materials in Wichita, Kansas, contracted to buy a Jadair machine for $75,850. The unit was shipped to Keeler's plant, but did not perform satisfactorily. In September of 1978 Keeler sent Jadair a bill for $6,825.24 worth of electrical and hydraulic repairs to the machine. The parties were not able to resolve their differences, including who should pay this bill.

What would have been a garden-variety contract dispute became more complicated as the parties jockeyed for litigating position. Seeking a convenient forum Jadair moved first. On October 22, 1979, it asked the Circuit Court of Milwaukee County to declare it free of any liability to Keeler. Keeler countered by removing the action to federal court on November 15, 1979, apparently in hopes Wisconsin's long-arm statute would be construed more narrowly there than in a Wisconsin state court. If it were successful in having the suit dismissed, Keeler could then force Jadair either to litigate in Kansas or to wait to be sued in Wisconsin.

II

As a single defendant and non-citizen of Wisconsin, Keeler was entitled to remove the lawsuit against it from state to federal court, if the federal court could have entertained the case in the first place. 28 U.S.C. § 1441(a) and (b). That provision requires in this instance that diversity jurisdiction be properly invocable —*i.e.*, that the dispute be between citizens of different states and that the amount in controversy exceed $10,000, exclusive of interest and costs. 28 U.S.C. § 1332(a).

For purposes of this appeal, the only issue is how to evaluate, *ex ante*, the amount in controversy. Declaratory judgment and injunctive relief actions sometimes present difficult and subtle valuation problems, as *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 391-395 (7th Cir. 1979), indicates. Here, however, Jadair sought a declaration of nonliability as to any and all Keeler claims. Therefore the amount in controversy must be what Keeler could possibly recover from Jadair. Jadair argues that Keeler's maximum recovery would be its $6,825.24 out-of-pocket expenses. In response Keeler says it has additional claims for $9,300 in consequential damages, or for rescission and restoration of the contract price. Jadair thinks we must ignore these claims because (1) Keeler never demanded either consequential damages or rescission in its negotiations with Jadair; (2) Keeler made the claims only after Jadair moved to remand the case, and the jurisdictional amount must be demonstrated at the time of Keeler's removal petition; (3) consequential damages were excluded by contractual agreement; and (4) rescission is too remote a possibility to count in the computation.

Jadair's first two objections are easily disposed of. Conduct during negotiations could conceivably create an estoppel which would preclude success on the merits,[1] but a party's prayer for relief is not legally limited to

[1] We speak theoretically and intimate no view about estoppel in this case.

amounts he would have settled for when he thought settlement was a real possibility.[2] Nor is a court obliged to rely solely on the removal petition—or on an original complaint—to test the sufficiency of the alleged jurisdictional amount. It is entitled to consider the matter when the parties raise it, as they did here by a motion to remand and the memorandum and affidavits in opposition thereto. Exactly this procedure was followed by the district court, without demur by this Court, in *McCarty*, *supra*, 595 F.2d at 391.

Jadair's third argument involves the application of the Uniform Commercial Code, as enacted in Wisconsin and Kansas.[3] The contract limited damages to the costs of repair or replacement, but that provision may not be enforceable if "circumstances cause [the] exclusive or limited remedy to fail of its essential purpose." UCC § 2-719(2). Whether the repair efforts were futile enough to activate section 2-719(2) is a factual question not yet capable of resolution, but it is at least not impossible that Keeler could recover both its direct and consequential damages, which together amount to more than $14,500.

Like the district judge, we need not reach Keeler's claim for rescission and Jadair's argument against it,

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[2] Jadair throughout its brief treats this case as if Keeler were the plaintiff and had sought $6,825.24 in state court, voluntarily dismissed its suit, and then brought it in federal court with an inexplicably inflated prayer for relief. Only if Keeler's position is so misconstrued is *Arnold v. Troccoli*, 344 F.2d 842 (2d Cir. 1965), comparable. Jadair Br. 15-17. Here the change from a negotiating to a litigating posture is sufficient to explain Keeler's changed demands.

[3] The choice-of-law issue is cloudy. Jadair Br. 19, n. 3, argues that Kansas law would govern under Wisconsin choice-of-law rules. But Keeler Br. 9 states that the contract had a choice-of-law provision calling for the application of Wisconsin law. Apart from a possibly more conservative judicial construction of Section 2-719(2) in Kansas (Jadair Br. 23-25), it is immaterial because both states have enacted the Code. But see note 7 *infra*.

because the jurisdictional hurdle is surmounted by Keeler's showing on direct and consequential damages. We note, however, that the rescission claim too is grounded on the Uniform Commercial Code[4] and requires factual development. Keeler's right to rescind is not contingent, however, nor is its value necessarily less than $10,000.[5]

III

Having established that the district court had subject-matter jurisdiction, we turn to the issue of personal jurisdiction. The Wisconsin long-arm statute, made applicable in federal diversity cases by Rules 4(e) and 4(d)(7) of the Federal Rules of Civil Procedure, contemplates jurisdiction over an out-of-state defendant if the action "[r]elates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction." Wis. Stat. Ann. 1977, § 801.05(5)(d). But there are constitutional limits on the reach of the Wisconsin statute.[6]

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[4] White and Summers, Handbook of the Law under the Uniform Commercial Code (2d ed. 1980), 295, n. 2, assume that the Code's revocation provision (Section 2-608) replaces common-law rescission unless there is an allegation of fraud.

[5] Thus the right to revoke is not comparable to the possibility of receiving future disability payments under an insurance contract. The analogy is drawn at Jadair Br. 18. The value of the right to rescind is a more difficult question. The parties have assumed that it is equal to the contract price ($75,850), but Keeler would have to return the machine if it got its money back. On the other hand, the jurisdictional amount does not ordinarily have to reflect counterclaims or offsets; it is not a net figure.

[6] Jadair assumes (Br. 29-30) that these constitutional limits are really just ill-masked policy determinations by federal courts. The line of Supreme Court precedent, stretching from *Pennoyer v. Neff*, 95 U.S. 714, to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, suggests otherwise. Furthermore, Jadair's hostility to policy determinations is only intermittent: in its argument in favor of a remand, it invites us to note proposals to raise the jurisdictional amount in diversity cases to $25,000 and to find in its favor because federal courts should not be "clogged" with diversity suits (Br. 12-14).

The Supreme Court's most recent statement of those limits is as follows:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State.[7] Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. * * * The Due Process Clause, by ensuring the "orderly administration of the laws," * * * gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit.
>
> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297.

This case presents us with a defendant whose only connection with Wisconsin was ordering a machine from a manufacturer headquartered there. Keeler personnel never visited Jadair's plant or negotiated with Jadair in Wisconsin. All face-to-face meetings between Keeler and Jadair occurred in Wichita. The contract was agreed on and executed there. The telephone calls and letters which Jadair claims have jurisdictional significance are not, as Jadair hints, separate contacts. They are all attempts by Keeler to get Jadair to repair the malfunctioning machine. If selling the machine to a Kansas buyer is not sufficient to warrant bringing him into a Wisconsin court, Keeler's later efforts to get the machine to work properly cannot add anything to the calculations.[8]

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[7] Or, in the circumstances here, that a product will be manufactured in the forum state.

[8] In some circumstances an explicit choice-of-law provision in the contract might be relevant to the defendant's reasonable expectation of suit in the forum whose law is chosen. Here, however, neither party relies on the contract's choice-of-law provision; indeed Jadair hopes to have the substantive law of Kansas applied. See note 3 *supra*. Accordingly we give the provision no weight as a forum contact.

We are presented therefore with a case that is entirely governed by *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), certiorari denied, 445 U.S. 907. There, as here, we could assume that the buyer believed the seller would perform in Wisconsin, 597 F.2d at 603. There, unlike here, the buyer had sent the purchase order to Wisconsin, *id.* at 604. There, and *a fortiori* here, the dearth of contacts made it unfair to require the out-of-state buyer to defend in a Wisconsin court. As the *Lakeside* court remarked, citing *Hanson v. Denckla*, 357 U.S. 235, 253, "[t]he unilateral activity of [one] who claim[s] some relationship with a nonresident defendant * * * cannot satisfy the requirement of contact with a forum State." 597 F.2d at 603. *Accord, Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981).

Recognizing the importance of *Lakeside*, Jadair attacks it as a return to the old-fashioned territorialism of *Pennoyer v. Neff*, 95 U.S. 714, and notes law review commentary critical of its reasoning.[9] We think the inflexibility of *Lakeside* has been exaggerated.[10] The case is a sound attempt to define the limits of long-arm jurisdiction in commercial contexts. Assuming that long-arm jurisdiction has some such limits, surely the defendant whose sole contact with a state is that his seller's

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[9] See Jadair Br. 31-39, 42-43.

[10] Thus in *Biltmoor Moving & Storage Co. v. Shell Oil Co.*, 606 F.2d 202 (7th Cir. 1979), we allowed Illinois to assert jurisdiction in a dispute between Texas and Missouri moving companies. The decisive contact with Illinois was that the entity to be moved was Shell Oil Company's research laboratory in Wood River, Illinois. And in *Wisconsin Electrical Manufacturing Co., Inc. v. Pennant Products, Inc.*, 619 F.2d 676 (7th Cir. 1980), we upheld Wisconsin jurisdiction over a New York corporation on the basis of two visits to Wisconsin, each of which was of major importance to the negotiation of the contract.

place of business is located there is entitled to invoke them.[11]

The judgment appealed from is affirmed. Costs to appellee.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] *Cf.* Comment, *Constitutional Limits on State Long Arm Jurisdiction*, 49 U. Chi. L. Rev. 156, 174-177 (1982). The author suggests that the Commerce Clause reinforces the Due Process Clause and serves as an independent restraint on long-arm jurisdiction in some circumstances. The analysis there would support the result, though not necessarily the rationale, in *Lakeside*.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JADAIR, INC.,

Plaintiff,

vs. Case No. 79-C-971

THE WALT KEELER COMPANY, INC., Entered February 23, 1981

Defendant.

MEMORANDUM AND ORDER

The plaintiff in this action is Jadair, Inc., a Wisconsin corporation which manufactures Redi-Wash equipment at its plant in Port Washington, Wisconsin. A Redi-Wash machine is a device used to clean out cement trucks after they have hauled a load of cement. The defendant, The Walt

Keeler Co., is a Kansas corporation which purchased a Redi-Wash machine from plaintiff. The plaintiff brought this action seeking a declaratory judgment that it is not indebted to the defendant for any damage due to difficulties defendant experienced with plaintiff's machine. The defendant has filed a motion to dismiss for lack of personal jurisdiction. After substantial discovery on the issue, the plaintiff responded and the issue is now ripe for resolution.

The following facts are undisputed. On October 25, 1978, plaintiff's sales manager, William Sarring, met with defendant's president, Earl Callison, at defendant's facility in Wichita, Kansas to discuss the selling of a Redi-Wash machine to defendant.

During this meeting, Mr. Sarring informed Mr. Callison that if Walt Keeler purchased a Redi-Wash machine, it would be produced at the Jadair facility in Port Washington, Wisconsin and that was the only place where the machine could be built.

On November 1, 1978, the parties entered into a contract for the purchase and sale of a Redi-Wash machine. The contract was signed at defendant's facilities in Wichita, Kansas. It provided for the purchase of one Redi-Wash machine F.O.B. seller's plant, Port Washington, Wisconsin.

Defendant's officers and employees never came to Wisconsin in connection with this purchase. Furthermore, defendant has no offices, bank accounts or listing in Wisconsin and transacts

no business in the state.

Wisconsin Statutes section 801.05(5)(d) provides that the courts of the state have jurisdiction over a person in any action which:

> (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction.

This provision of the Wisconsin long-arm statute is, however, subject to the caveat that the legislature intended that the statute would "reach only so far as permitted by the due process clause of the Fourteenth Amendment to the United States Constitution and no further." Lakeside Bridge & Steel v. Mountain State Construction Co., 597 F.2d 596, 599 (7th Cir. 1979) citing Flambeau Plastics Corp. v. King Bee Mfg. Co., 24 Wis.2d 459, 129 N.W.2d 237

(1964). Therefore, in interpreting the statute, the Court must determine whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). This standard must be applied on a case-by-case basis. Id.

Recently, the seventh circuit has demonstrated how enigmatic the concept of personal jurisdiction is given the various factors the courts must consider. In Lakeside Bridge Steel v. Mountain State Construction, the court held that a foreign corporation was not subject to jurisdiction in Wisconsin when the sole basis for the assertion

of jurisdiction was the unilateral activity of the resident plaintiff. 597 F.2d at 603. In reaching its decision, the court applied the factors set out in The Restatement (Second) of Conflict of Laws, § 37 comment a. Comment a states that when an out-of-state

> act may not have been done with the intention of causing effects in the state but could reasonably have been expected to do so [the state's power to exercise judicial jurisdiction] depends upon a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff-the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the state on the particular cause of action.

Because the defendant in Lakeside had no other contacts with Wisconsin and because the activity it caused in Wisconsin - the production of goods - was not highly dangerous, the court held that it lacked significant contact with Wisconsin to subject it to jurisdiction in the state. The court, however, expressly declined to decide if the result would be different had the contract specifically required production in Wisconsin or if the nature of the plaintiff's contractual obligations made performance in the forum state necessary. Id. at 603 n.13. The seventh circuit in ruling as it did in Lakeside Bridge & Steel aligned itself with a number of other circuits that have held that performance of a contract in the forum state

by plaintiff is not enough by itself to establish jurisdiction over a non-resident defendant without any other contacts with the forum state. Id. at 601 and cases cited therein.

Many read the seventh circuit's decision in Lakeside as a retrenchment by the court on the issue of personal jurisdiction. Yet, a few months after Lakeside, the court distinguished its Lakeside opinion in holding that personal jurisdiction did exist over a non-resident defendant whose officers had made two trips to Wisconsin for purposes related to the contracts. Wisconsin Electric Manufacturing Co. v. Pennant Products, 619 F.2d 676 (7th Cir. 1980). The court found that the two visits to Wisconsin by officials of Pennant Products were significant

to the formation and performance of the contract and thus defendant had conducted avtivities [sic] in the forum state sufficient to satisfy due process. Id. at 678. Absent these two contacts, the defendant lacked any connection with the state.

The decision in Pennant Products appeared to cast doubt on the reasoning of the Lakeside court because the seventh circuit failed to explain why face-to-face negotiations in Wisconsin differed from negotiations by mail or phone with regard to the issue of jurisdiction. This is especially true given the court's expressed disavowal that it was deciding the issue based on the defendant's presence in the state. 619 F.2d at 678 n.8.

The seventh circuit further muddled the issue in its most recent opinion in Koster v. Automark Industries, Inc., No. 80-1765 slip op. (7th Cir. Feb. 3, 1981). There the court cited with approval and expressly relied on its opinion in Lakeside to hold that a corporation which had done business with a citizen of the Netherlands, but not in the Netherlands, was not amenable to jurisdiction in the Netherlands. In further explaining the Lakeside opinion, the court noted that it assumed that the defendant in Lakeside believed the contract would be performed in Wisconsin. Slip Op. at 4. This, however, was not enough for a successful assertion of jurisdiction under the circumstances.

In light of the Koster case, the Court finds that the reasoning in Lakeside has continuing viability. Furthermore, the Court finds that under the reasoning of Lakeside, defendant does not have sufficient contacts with the state of Wisconsin to subject it to the jurisdiction of the state without violating due process. As stated earlier, defendant had no other contacts with Wisconsin, its officials never came into the state, and the contract did not require that the plaintiff perform a particularly dangerous activity in the state. Furthermore, contrary to plaintiff's suggestion, that the defendant knew the contract would be performed in Wisconsin is not a significant factor. Koster v. Automark Industries, Inc.,

Slip Op. at 4. The contract itself did not require performance in Wisconsin, nor did the nature of plaintiff's performance make performance in the state a necessity. That the only plant that could produce the product was located in Wisconsin did not make performance necessary in Wisconsin. It did, however, make it inevitable.

Finally, the Court concurs with the practical reasoning of the first circuit in Whittaker Corporation v. United Aircraft Corporation, 482 F.2d 1079, 1085 (1st Cir. 1973) that the "interest of the forum [state] in not discouraging foreign purchasers from dealing with resident sellers for fear of having to engage in litigation in distant courts undercuts an expansive

interpretation" of Wisconsin's long-arm statute.

On the basis of the foregoing, the Court finds that the defendant's motion to dismiss for lack of personal jurisdiction must be and is hereby granted.

SO ORDERED this 23rd day of February, 1981, at Milwaukee, Wisconsin.

/s/ Rogert W. Warren
UNITED STATES DISTRICT JUDGE

Opinion by Judge Cummings

JUDGMENT -- WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 26, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. ROBERT A. SPRECHER, Circuit Judge*

Hon. HARLINGTON WOOD, JR., Circuit Judge

JADAIR, INC., Plaintiff-Appellant	Appeal from the United States District Court for the Eastern District of Wisconsin
No. 81-1380 vs.	
THE WALT KEELER COMPANY, INC., Defendant-Appellee.	No. 79-C-791 Judge Robert W. Warren

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* Circuit Judge Robert A. Sprecher read the briefs, participated in the conference and voted to affirm. However, he died without reviewing this opinion.

This cause came before the Court for decision on the record from the United States District Court for the Eastern District of Wisconsin.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, costs on appeal to appellee, in accordance with the opinion of this Court filed this date.

Office-Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-330

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JADAIR, INC.,

Petitioner,

v.

THE WALT KEELER COMPANY, INC.,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does it offend Due Process concepts of "fair play and substantial justice" to require a Kansas buyer of machinery to defend a declaratory judgment action by a Wisconsin seller in the seller's state of residence, when the buyer's only contact with Wisconsin is that the seller's place of business is located there?

LIST OF ALL PARTIES

All parties respondent appear on the caption. There are no companies affiliated with The Walt Keeler Company, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, The Walt Keeler Company, Inc., respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Petitioner

seeking a review of the decision of the Seventh Circuit reported at 679 F.2d 131.

SUMMARY OF ARGUMENT

Certiorari should not be granted because this case presents two atypical fact situations. First, it is an action by a seller for declaratory judgment that the seller is not liable to the buyer for breach of warranty. Second, the jurisdictional amount was challenged below, although not here, indicating that the amount in dispute is unusually low for the federal courts, not to mention the Supreme Court of the United States.

The decision of the Seventh Circuit on the atypical facts of this case does not conflict with decisions by other Circuit Courts of Appeals. What the decision of the Seventh Circuit holds

is that "traditional notions of fair play and substantial justice" are not satisfied by a declaratory judgment action by a seller against a buyer whose sole contact with the forum state was the purchase of a single piece of machinery which happened to be manufactured in that state. This holding is not inconsistent with the decisions of other Circuit Courts of Appeals.

I. A PRONOUNCEMENT BY THIS COURT ON LONG-ARM JURISDICTION OVER BUYERS IN THE CONTEXT OF A DECLARATORY JUDGMENT TO DECLARE A SELLER "FREE OF LIABILITY" WOULD BE OF DOUBTFUL PRECEDENTIAL VALUE.

It would not be an efficient utilization of this Court's scarce and precious resources to first address the issue of long-arm jurisdiction over buyers in a case which could easily be distinguished in "garden-variety" suits. Because of the declaratory judgment

aspect of this case, it is not only possible, but likely, that a decision of this Court, particularly one affirming the decision below, could be distinguished in mine-run cases. Therefore, this Court should not accept certiorari.

The Seventh Circuit specifically noted that this was not a "garden-variety" contract dispute (Pet. App., p. 2) because Jadair, Inc. (hereafter "Seller") launched a jurisdictional preemptive strike by commencing this declaratory judgment action "to declare it free of any liability" for deficiencies in machinery sold by Seller to The Walt Keeler Company, Inc. (hereafter "Buyer"). There can be no serious doubt that this declaratory judgment action was commenced by Seller solely for the purpose of obtaining a jurisdictional advantage over Buyer.

A declaratory judgment action commenced solely for the purpose of obtaining a jurisdictional advantage presents special considerations not present in a routine action by a seller for the price of goods. Courts ought not to encourage race-to-the-courthouse declaratory judgment actions because, contrary to the proper function of a declaratory judgment action, such actions stimulate, rather than resolve, disputes. It is very difficult to argue, as Seller has discovered here, that "traditional notions of fair play" are not offended by such actions. It is certainly not unfair to permit Buyer, who has paid in full for the goods in question, to choose the forum for an action for breach of Seller's completed performance.

The Court's recent denials of certiorari in cases raising the general

issue of long-arm jurisdiction over buyers[1] came in cases which were much more typical suits for the price of the goods sold or for a specific performance of the contract. If the Court wishes to resolve that issue, it may await a more typical case than this one, firm in the knowledge that such an opportunity will be presented sooner rather than later.

Thus, without disputing Seller's contention that the Court should, at some point, resolve the issue of long-arm jurisdiction over buyers,

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[1] Mouzavires v. Baxter, 434 A.2d 988 (D.C. Cir. 1981), cert. denied, ____ U.S. ____, 102 S. Ct. 1643 (1982); Iowa Electric Light & Power Co. v. Atlas Corp., 603 F.2d 1301, (8th Cir. 1979), cert. denied, 445 U.S. 911 (1980); Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560 (Tenn. 1981), cert. denied, ____ U.S. ____, 102 S. Ct. 1623 (1982).

this is the wrong case for the Court to address the issue.

II. THIS COURT SHOULD NOT CONSIDER THE ISSUE PRESENTED IN THE CONTEXT OF A CASE WHICH BARELY SATISFIES THE JURISDICTIONAL MINIMUM.

Given the limitations upon the number of cases which this Court can consider, it ought, if possible, to select cases to decide which are typical of the class of cases in which the issue to be resolved is presented. This case is not typical as to amount because the jurisdictional amount was disputed below, although it is not raised here.

It is significant to note that the two cases the past term which could have presented this issue, i.e., Mouzavires v. Baxter, 434 A.2d 988 (D.C. Cir. 1981) and Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560 (Tenn. 1981), but were rejected,

were also cases involving comparatively small amounts of money.

While, obviously, no one case will be typical of all cases as to the amount in issue, the Court might wish to consider the issue in the context of a case which is typical of federal cases at least. This case is not.

Furthermore, Buyer wishes to point out the irony inherent in Seller's Petition for a Writ of Certiorari. Buyer moved to dismiss this case nearly three years ago on the ground that it was unfair to require Buyer, basically a company with a local business in Wichita, Kansas, to come to Wisconsin, a distant forum, to assert Buyer's claim against Seller for breach. Now, notwithstanding the concurrence of every judge to have considered its motion that it is not fair to require Buyer to assert its claims in

Wisconsin, not only has Buyer been subjected to nearly three years of litigation in that distant forum, Seller now seeks to require Buyer to defend this appeal in the yet more remote forum of this Court. Sadly, one must conclude that, no matter how this Court rules on this motion, Buyer has been subjected to serious injustice. Buyer trusts that the Court will not further compound that injustice by requiring Buyer to address yet one more court before it is <u>finally</u> determined that the very existence of this case is a violation of Due Process.

III. ON THE FACTS OF THIS CASE, THE DECISION OF THE SEVENTH CIRCUIT WAS BOTH CORRECT AND NOT IN CONFLICT WITH OTHER FEDERAL CIRCUITS.

The holding of the Seventh Circuit was simply that a buyer cannot be sued in a state when his "sole contact with [that] state is that his seller's place

of business is located there." (Pet. App., p. 8) This holding is sound. Any other rule, unless the size of the transaction or the relative size of the parties were elevated to controlling factors, would subject all buyers, including mail order buyers, to suit in distant forums. It is one thing to subject an interstate seller to suit elsewhere; when it deliberately embarks upon an interstate business it takes that risk. It is something else altogether to subject essentially local persons who, of necessity, must buy at least some goods in interstate commerce to the same risk.

Seller has failed to show an actual conflict between the decision of the Seventh Circuit on the facts of this case and the decisions of other federal circuits.

In Cleverock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979), and In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 232-35 (6th Cir. 1972), there was physical presence by agents of the defendants within the forum state, a factor not present here. Indeed, dictum in In-Flight strongly supports the Seventh Circuit's approach on the facts of this case.

The interest of a state in protecting its citizens against breaches of contract was relied upon in Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977). Here, however, Seller was paid in full.

Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972); Shealy v. Challenger Mfg. Co., 304 F.2d 102 (4th Cir. 1962); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th

Cir. 1974; Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968); and Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365 (8th Cir. 1969);[2] are not in point at all because the plaintiff there was the buyer (licensee) not the seller (licensor), as is the case here.

CONCLUSION

Respondent respectfully submits that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted

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[2]The most recent Eighth Circuit Decision is clearly in accord with the decision below. See, Iowa Electric Light & Power Co. v. Atlas Corp., 603 F.2d 1301, (8th Cir. 1979.)